IMPEACHMENT OF THE PRESIDENT.

OPINION

OF

MR. STEWART, OF NEVADA,

IN THE SENATE OF THE UNITED STATES, MAY 11, 1868.

OPINION.

MR. PRESIDENT: A brief examination of the law will determine the character of the President's conduct in removing Stanton and appointing Thomas *ad interim*. The act to regulate the tenure of certain civil offices supercedes all former legislation on the questions involved in that removal and appointment. The 6th section of the act declares:

"That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors, and, upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the courts."

The same penalties are imposed for issuing orders or giving letters of authority for or in respect to removals and appointments which are prohibited by law that are imposed in cases of actual removals and appointments. It matters not whether Stanton was actually removed or Thomas actually appointed *ad interim*, the issuance of the order for the removal and the giving the letter of authority to Thomas are admitted. If the power was wanting either to remove Stanton or to appoint Thomas, the President is guilty of a high misdemeanor, on the admitted facts. The questions, then, to be determined are, was the removal of Stanton and the appointment or employment of Thomas, or either of them, unlawful? The body of the first section declares:

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as *herein otherwise provided*."

This language, if unqualified by any other provisions of the act, would extend the term of all officers therein described (including Mr. Stanton, Secretary of War,) until a removal by the appointment and qualification of a successor as *therein provided*. It also prescribes the manner in which removals and appointments may be effected, and prohibits all other modes of removals and appointments. The term of office and the mode of vacating and filling office are the three distinct propositions of the body of the first section of the act. There must be no departure from these propositions, except as therein (that is, in that act,) otherwise provided. All former acts of Congress providing a different term or a different mode of appointment or removal are by this section repealed. Any practice of the government inconsistent with the provisions of this law is prohibited. This dispenses with the necessity of examining former acts or former practice concerning any matter within the scope and meaning of this section. There can be no qualification to this language not found in the act itself. It does not read, except as the practice of the government or former acts of Congress may prescribe, but it does read, *except as herein otherwise provided*. Can the legislative will, in repealing former acts or changing existing practice, be more clearly expressed than to declare a rule and also to declare that it shall be the only rule? The body of the first section clearly prohibited the removal of Stanton and the appointment of Thomas *ad interim*. If these acts were not in violation of law, it was because they were authorized by other provisions in the act itself. The interpretation of the act, then, so far as it

effects the President, depends upon the question, what is *therein otherwise provided?* Is it *therein provided* that he may do the acts complained of? If so, he obeyed the law; if not, he violated it. The limitations or exceptions upon the first section are four. One relates to removals, one to appointments, and two relate to the term of office. The former are contained in the second section, and the latter are found in the fourth section and the proviso to the first. The second section reads as follows:

"That when any officer appointed as aforesaid, excepting judges of the United States courts, shall during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, *and in no other*, the President may suspend such officer and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate, and such person so designated shall take the oaths and give the bonds required by law, to be taken and given by the person duly appointed to fill such office, and in such case it shall be the duty of the President within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office, and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer, shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended."

The emphatic language is "*in such case and no other*" the President may suspend and designate a person to perform the duties of said office temporarily. This suspension and temporary appointment limit two of the general propositions in the first section, first, a temporary removal may be made by the President alone at the times and in the cases therein provided, but in no other. This limits the first section so that in substance the act declares that no person now in office, or who may hereafter be in office by and with the advice and consent of the Senate, shall be removed by the President alone without the advice and consent of the Senate to the appointment of a successor, except in recess of the Senate, when the President may suspend for the causes set forth in the second section of this act, and in no other case whatever. The other general proposition of the first section which is limited by the second section relates to appointments.

Upon the question of appointment, to an office held by another, the first and second sections contain all existing statutory regulations. The substance of these two sections bearing upon the question under consideration is, that no person shall be appointed by the President alone, to an office where there is no vacancy, and which office is, by law, to be filled by and with the advice and consent of the Senate, without such advice and consent except in cases of suspension in the *recess* of the Senate arising under the provisions of the second section of this act, and in such *case and no other* the President may make temporary appointment, as therein provided. The temporary suspension and appointment are limitations upon the positive language of the first section, and are qualifications therein otherwise provided, and the only qualifications anywhere appearing in the act to the general rule requiring the advice and consent of the Senate to an appointment, and prohibiting all removals, except through such appointment. It is true the removal is not complete, but it is the first step towards it, and is an actual suspension from office without the advice and consent of the Senate to the appointment of a successor, and it is also true that the appointment is only temporary, but the appointee, contrary to the provisions of the first section, enters upon the discharge of the duties of the office without any action of the Senate.

This is all the statutory law which bears upon the question under considera-

tion, namely the removal of Stanton and the appointment of Thomas *ad interim*, and it positively prohibits that removal and appointment by the President alone. The President recognized the binding force of this law in the suspension of Stanton and appointment of General Grant *ad interim*, and in several other cases, and his subsequent disregard of its plain provisions cannot be pleaded as an inadvertance. The two other exceptions to the first section do not relate to the mode of vacating or filling office, which is the subject of inquiry, but to the term of office. The only reason for an examination of these exceptions in this connection is to exclude any inference that provision is made in the act either for removing Stanton or appointing Thomas *ad interim*.

The fourth section reads as follows :

" That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law."

This section leaves unchanged the term of office as fixed by law, notwithstanding the general language of the first section that such term shall extend until the appointment and qualification of a successor. The proviso contains the other limitation and relates to the term of certain designated offices, but contains no exception to the general rule as to removals or appointments. The language is " *Provided*, That the Secretary of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate." Nothing is more certain than that this proviso is silent, both as to removals and appointments by the President alone. The proviso fixes a limit on the term of the offices therein named, but makes no other exception. If it be contended that the language is obscured, how does that obscurity help the President, for no possible construction can make it confer the authority to do what is prohibited in the body of the section, namely, to remove an officer and appoint another to fill his place *ad interim* without the advice and consent of the Senate. When the President found that he was prohibited from removing, suspending, or appointing, except as in said act provided, it was enough for him to know that nothing in the act authorized him to remove Stanton and appoint Thomas *ad interim*. Stanton's appointment was for an indefinite term, and he was still in office on the 21st day of February, 1868. It makes no difference what his term of office was or by whom appointed. The mode adopted to put him out was prohibited. There is no reason, in view of the conduct of the parties or the language of the law, to support the suggestion that the law was retroactive and operated to terminate Stanton's office one month after Johnson became President. Such a construction would not only be inconsistent with the whole conduct of the President in recognizing Stanton as Secretary of War, but would be in violation of the well-established rule of statutory construction that no law shall have a retroactive effect, unless the will of the law making power be so clearly expressed as to be wholly inconsistent with any other interpretation. This law, without any violation of language or principles of construction, applies to the present and to the future, and was so understood, until it became important to change or pervert its obvious meaning.

The President understood the law on the 2d of March, 1867, when he sent his veto message to Congress. (Page 38 of Record.)

He says in that message, " In effect the bill provides that the President shall not remove from their places any of the civil officers whose terms of service are not limited by law without the advice and consent of the Senate of the United States." Then it included any civil officers whatever. Now it includes some and excludes others.

I am aware that a constitutional question has been raised upon the denial of the right of the President to remove from office, which I need not discuss after

the repeated votes of the Senate affirming the constitutional validity of such a law. But no one has contended or will contend that the President could make any appointment for any temporary purpose whatever, without the authority of law, and he certainly cannot do so against a plain statute. The issuance of the letter of authority for the appointment or employment of Thomas is expressly declared to be a misdemeanor. It is no answer to the admitted constitutional power of Congress to pass the law to say that cases might arise in which it might be inconvenient if the President were deprived of the right to fill temporary vacancies. That would be a matter for the legislative department to decide, and besides no such case had arisen when Thomas was appointed or employed, but on the contrary Mr. Stanton was in office and fully qualified to discharge the duties of the Department of War. It is no excuse for violating a law to say that cases may arise when the law would work inconveniences particularly when no inconvenience exists in the given case. No precedent has been found in the history of the government for the removal of Stanton and the appointment of Thomas *ad interim*. They are in direct violation of the Constitution and cannot be justified or excused by practice, if such practice has existed.

Usurpation is not to be tolerated against the express provisions of written law and against the protest of the Senate after mature consideration. I regard the removal of Stanton and the appointment of Thomas as parts of the same transaction. The two acts taken together in defiance of law and the decision of the Senate, constitute a bold and deliberato attempt to dispense with the provision of the Constitution which makes the advice and consent of the Senate necessary to the appointment to office. For if the President can remove the Secretary of War and appoint a person *ad interim* to fill the place, the advice and consent of the Senate are of no consequence. This would authorize him to remove all executive officers, civil and military, and put persons into these offices suitable to his purposes, who might remain in office indefinitely. He might or he might not nominate to the Senate. If he should condescend to do so he might nominate the persons holding *ad interim*, and the Senate could only choose whether it would confirm the nominees or let the same persons continue *ad interim*. The Senate could in that case choose as to the character of the commissions, but would have no voice as to the character of the officers. But suppose the President should nominate different persons from the *ad interim* appointees, which persons would of course be also the choice of the Executive, and in that event the Senate might confirm or allow the *ad interim* officers to continue to discharge the duties of the respective offices. In that case the Senate would have the poor privilege of choosing between two instruments of the President. If this can be done in the case of the Secretary of War, it can be done in all cases of executive offices, civil and military. The whole power of the government would then be in the hands of one man. He could then have his tools in all the offices through whom alone the civil and military power of the United States could be exercised. To acquit Andrew Johnson is to affirm this power in the present and all future presidents.

The motives of the President in deliberately violating law cannot be considered. Such a defence might be set up in every criminal case. He does not claim that he did not intend to issue the order for the removal of Stanton and issue the letter for the appointment of Thomas *ad interim*. If either of these acts was a misdemeanor, he intended to commit a misdemeanor The question of intention or motive can only be material where doubt exists as to voluntary or deliberate character of the offence. My conclusion is that the President deliberately violated the law both in issuing the order for the removal of Stanton and in giving the letter of authority to Thomas, and that all the articles involving a charge of either of those acts ought to be sustained if we desire to preserve the just balance of the co-ordinate departments of the government and vindicate the authority of law.